

**IN THE UNITED STATES COURT OF
APPEALS FOR VETERANS CLAIMS**

Vet. App. No. 01-1489

ROQUE A. ACOSTA

Appellant

vs.

ANTHONY PRINCIPI

Secretary of Veterans Affairs

Appellee

On Appeal From the Board of Veterans' Appeals

Brief of the Appellant Roque A. Acosta

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**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

ROQUE ACOSTA,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 01-1489
)	
ANTHONY PRINCIPI,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

**ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS**

BRIEF OF THE APPELLANT

ISSUE PRESENTED

Whether a June 2001 BVA decision that denied entitlement to an earlier effective date for service connection for chronic paranoid schizophrenia, and that failed to address a claim for increased rating for that disorder, contains prejudicial error.

STATEMENT OF THE CASE

A. JURISDICTIONAL STATEMENT

The Court's jurisdiction in this matter is predicated on 38 U.S.C. § 7252.

B. NATURE OF THE CASE

The Appellant appeals from a June 2001, decision of the BVA that denied entitlement to an effective date, prior to February 3, 1995, for a grant of service connection for chronic paranoid schizophrenia, and which failed to address entitlement to a rating in excess of 70-percent for that condition.

FACTUAL BACKGROUND

Roque A. Acosta ("the appellant" or "the veteran") served on active duty in the United States Army from August 1975 to November 1975, and from May 1976 to May 1979. (R. at 14, 15).

In a March 1983 decision, the RO denied a claim for entitlement to service connection for a psychiatric disorder. (R. at 111). The veteran was notified of the decision by letter dated March 21, 1983. (R. at 109). On March 8, 1984, the veteran filed a Notice of Disagreement with the March 1983 RO decision. (R. at 209-212). The RO sent the veteran a Statement of the Case ("SOC") on May 1, 1984. (R. at 215-217).

On June 26, 1984, fifty-six days after he was sent the SOC, the veteran wrote to the RO, referencing the SOC. He stated, in pertinent part:

I have evidence, or will obtain evidence, that will verify that I had at least one visit to a psychiatric facility, within one year of discharge from service. I am in the process of locating these records, and

I am requesting additional time in order to
prepare my case.

(R. at 219) (emphasis added). There is no indication in the record that the RO responded to the veteran's request for additional time.

In February 1995, the veteran wrote to the RO asking for his claim to be reopened. (R. at 223). The BVA found that the veteran had submitted new and material evidence so as to reopen his claim, in a January 1998 decision. (R. at 333-342).

By rating decision in September 1998, the RO granted the veteran entitlement to service connection for chronic paranoid schizophrenia, rated as 70-percent disabling, effective February 3, 1995. (R. at 538-541). The veteran disagreed with the assigned effective date in a November 1998 statement. (R. at 543). Following a January 1999 SOC (R. at 552-569), the veteran perfected his appeal to the BVA in February 1999 (R. at 573).

In February 1999, the veteran filed a Notice of Disagreement with the 70-percent rating assigned by the RO, stating that he believed his disability prevented him from being able to work, or adapt socially. (R. at 571). VA did not send the veteran a Statement of the Case.

The appeal came before the BVA in June 2001. (R. at 1-12). The Board found that the veteran had failed to perfect an appeal to the March 1983 rating action, because he had not filed a timely Substantive Appeal. (R. at 3). As such, it found that the veteran could not be awarded an

effective date prior to February 1995, when he asked that his claim be reopened. (R. at 4). The Board did not address the veteran's appeal of the 70-percent rating.

SUMMARY OF ARGUMENT

The BVA provided inadequate reasons or bases for its finding that the veteran was not entitled to an earlier effective date, insofar as it failed to address the fact that the veteran filed a timely request for extension of time to perfect his appeal to a March 1983 decision, to which VA never responded.

Remand is also required because the Board failed to address the veteran's claim for entitlement to an increased rating for chronic paranoid schizophrenia.

ARGUMENT

1. The BVA failed to address whether the March 1983 rating action was timely in light of 38 C.F.R. § 19.130 (1983).

The effective date for the grant of service connection for a disability is the '[d]ay following separation from active service or date entitlement arose if claim is received within 1 year after separation from service; otherwise, date of receipt of claim, or date entitlement arose, whichever is later.' 38 C.F.R. § 3.400(b)(ii)(B)(2).

However, if service connection is granted based upon the submission of new and material evidence, following a prior final denial of

the claim, the effective date is the date of the receipt of the new claim or the date the entitlement arose, whichever is later. 38 C.F.R. § 3.400(q)(ii).

In the decision now on appeal, the BVA made findings of fact that the veteran's claim for service connection for a psychiatric disability was denied in March 1983, and that the veteran failed to timely appeal. (R. at 2, 6, 10). As such, the Board concluded that pursuant to 38 C.F.R. § 3.400(q)(ii), the effective date was properly February 3, 1995, the date the appellant filed his claim to reopen. (R. at 10).

The Board noted further that "the only matter currently on appeal consists of entitlement to an earlier effective date for the award of service connection for chronic psychiatric disability; the issue of timeliness or adequacy of the substantive appeal following the March 1983 RO denial of service connection for psychiatric disability is not now before the Board." (R. at 10).

In fact, the question of whether the veteran filed a timely substantive appeal was clearly before the BVA. Specifically, the Board came to the conclusion that the veteran failed to perfect an appeal to the March 1983 denial. That finding necessarily entails the underlying question of whether the veteran, in fact, timely perfected his appeal. If he did, the veteran could be entitled to an effective date as far back as September 1982, the date he filed his initial claim for service connection.

In this regard, the appellant notes that in March 1983, when the RO denied his claim for entitlement to service connection for a psychiatric disorder, VA regulations provided that:

An extension of the 60-day period for filing a Substantive Appeal, or the 30-day period for responding to a Supplemental Statement of the Case may be granted for good cause. A request for such an extension must be in writing and must be made prior to expiration of the time limit for filing the Substantive Appeal or the response to the Supplemental Statement of the Case. The request for extension must be filed with the Department of Veterans Affairs office from which the claimant received notice of the determination being appealed, unless notice has been received that the applicable records have been transferred to another Department of Veterans Affairs office. A denial of a request for extension may be appealed to the Board.

38 C.F.R. § 19.130 (1983).

The evidence reflects, and the Board concedes, that the veteran filed a timely Notice of Disagreement to the March 1983 rating decision (R. at 5), and that the RO sent the veteran a SOC in May 1984 (Id.).

Following the SOC, prior to the expiration of the 60-day period of time for filing his Substantive Appeal, the veteran wrote to the RO requesting an extension of time to perfect his appeal. (R. at 219). Despite having requested an extension of time, the RO failed to respond with any decision as to whether or not the extension had been granted or denied, and if granted, what date the Substantive Appeal would be due.

This Court has held that the “failure to file a timely [Substantive] Appeal does not automatically foreclose an appeal, render a claim final, or deprive the BVA of jurisdiction.” *Rowell v. Principi*, 4 Vet. App. 9, 17 (1993). In fact, VA may waive the timely receipt requirement, so long as a claimant files a request for extension of time pursuant to 38 C.F.R. § 20.303 (the current version of 38 C.F.R. § 19.130 in effect in 1983). *Roy v. Brown*, 5 Vet. App. 554 (1993).

Even though the appellant filed a timely request for extension of time to complete his Substantive Appeal, the RO never acted on that request, and the Board did not consider whether that failure tolled the period of time for the appellant to perfect his appeal, such that the March 1983 decision did not become final.

A Board determination of the proper effective date is a finding of fact. *Woods v. Gober*, 14 Vet. App. 214, 218 (2000). Under 38 U.S.C. § 7104(d)(1), a "decision of the Board shall include a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record . . ." *Gilbert v. Derwinski*, 1 Vet.App. 49 (1990). See *Ashley v. Brown*, 6 Vet.App. 52 (1993) (BVA's failure to fulfill duty to articulate reasons or bases for decisions may preclude effective review of adjudications). "Fulfillment of the reasons or bases mandate requires the BVA to set forth the precise basis for its decision, to analyze the credibility

and probative value of all material evidence submitted by and on behalf of a claimant in support of the claim and to provide a statement of its reasons or bases for rejecting any such evidence." *Gabrielson v. Brown*, 7 Vet.App. 36, 40 (1994).

In a similar situation, this Court has held that the failure to address whether good cause was shown to extend a filing date requirement is remandable error. VA regulations (38 C.F.R. § 3.109(b)), provide that the Secretary may accept a Notice of Disagreement that is filed after the time period set by law has expired, if there is good cause for such an exception. See *Corry v. Derwinski*, 3 Vet. App. 231, 235 (1992). This Court has held that when the Board is addressing the finality of an RO decision, and the record raises the potential applicability of section 3.109(b), that the Board must address the applicability of section 3.109(b), and that the failure to do so is remandable error. *Mason v. Brown*, 8 Vet. App. 44, 57 (1995).

Similarly, as the Board determined in this case, that the March 1983 decision was not timely appealed, without first considering whether the veteran had shown good cause for his extension request in light of 38 C.F.R. § 19.130 (1983), and the fact that the RO failed to respond to the appellant's timely request for extension of time, the Board failed to provide adequate reasons or bases, and remand is required.

2. The BVA failed to address the appeal regarding the assigned rating percentage.

As set forth above, the veteran filed a timely Notice of Disagreement with the 70-percent rating assigned by the RO in its September 1998 rating action. (R. at 571). Despite this fact, the RO did not issue a Statement of the Case, and the Board did not address the increased rating claim.

When the Board fails to act on a claim for which there is a valid NOD, the appropriate remedy is to remand to the Board for remand to the RO for issuance of an SOC. *See Holland v. Gober*, 10 Vet. App. 433, 436 (1997) (per curiam order) (vacating Board decision and remanding matter when VA failed to issue SOC after claimant submitted timely NOD). As such, the appellant asks that this Court remand the June 2001 BVA decision with instructions that the veteran be issued a Statement of the Case on the increased rating claim.

CONCLUSION

Wherefore, the Court should vacate and remand the Board's June 2001, decision, which denied entitlement to an earlier effective date for service connection for chronic paranoid schizophrenia, and which failed to address entitlement to an increased rating for chronic paranoid

schizophrenia.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2002, a true copy of the attached Brief was mailed, postage prepaid, upon General Counsel (027) Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420. I certify under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Daniel G. Krasnegor